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In the
Supreme Court of the United States
October Term, 1998

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION,

Petitioner,

vs.

CHARLES W. WILLIAMS, in his capacity as Commissioner of the Minnesota Pollution Control Agency, and EDWARD GARVEY, in his capacity as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under Minnesota law, public entities are created by the state and are subject to the control and direction of the state. Is the state a market participant under the dormant Commerce Clause when it establishes conditions that its public entities must follow if they contract for waste management services?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Eighth Circuit Court of Appeals in this case. The opinion is contained in Petitioner's Appendix ("Pet. App.") at A-1 and is reported at 146 F.3d 595. The opinion of the district court (Pet. App. A-10) is reported at 966 F.Supp. 844.

STATEMENT OF THE CASE

This case involves the claim of Petitioner, the National Solid Waste Management Association ("NSWMA"), that Minn. Stat. § 115A.46, subd. 5 (1996), violates the dormant Commerce Clause. The challenged statute provides that if a public entity chooses to manage solid waste it must do so in a manner that is not inconsistent with its county's solid waste management plan, unless the public entity obtains the consent of the county.

This statute was first enacted in 1991. At that time, the statute applied to "political subdivisions," which included such entities as cities, towns, and counties. Act of June 4, 1991, ch. 337, § 16, 1991 Minn. Laws 2464. In 1995, the law was amended by substituting the term "public entity" for "political subdivision" and clarifying that the statute also applied when the public entity contracted for the management of solid waste as well as when the public entity used its own employees to manage waste.[1] Act of June 1, 1995, ch. 247,

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[1] Minn. Stat. § 16B.122 subd. 1(f) (1996), defines the term "public entity" to mean "the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home

(Footnote Continued On Next Page.)

art. 1, § 8, 1995 Minn. Laws 2356. The effect of the change was to broaden the reach of the statute to include additional governmental units such as state agencies and offices. Thus, as now written, Minn. Stat. § 115A.46, subd. 5(b), states:

> After a county plan has been approved under subdivision 1, the plan governs all solid waste management in the county and *a public entity*, as defined in section 16B.122, subdivision 1, within the county *may not develop or implement a solid waste management activity*, other than an activity to reduce waste generation or reuse waste materials, *that is inconsistent with the county plan that the county is actively implementing without the consent of the county*.

(Emphasis added.)[2] Although the statute applies both when a public entity manages waste using its own employees and when it contracts with a waste hauler to manage waste on behalf of the public entity, NSWMA has focused its challenge on the contracting aspect of the statute.

Only public entities that choose to manage waste must comply with the statute. Some cities and towns in Minnesota

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rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity."

[2] Although NSWMA did not limit its constitutional challenge to subpart (b) of Minn. Stat. § 115A.46, subd. 5, only that subpart is, as a practical matter, still in effect. This is because subpart (a) refers to requirements *before* a county plan has been approved. Since all counties now have approved solid waste management plans, any challenge to subpart 5(a) is moot. Affidavit of Arthur E. Dunn ("Dunn Aff.") ¶ 13, Appellant's Appendix in the court of appeals ("Appellant's App.") 00151.

choose to provide garbage collection and management among the public services available to their citizens; others do not. For example, Minnesota's two largest cities, Minneapolis and St. Paul, which are of about equal size, have adopted different approaches. Minneapolis collects and manages waste from households but not from businesses. Second Affidavit of Arthur E. Dunn ("Dunn Aff. #2"), ¶ 7, Appellees' Appendix in the court of appeals ("Appellees' App.") 3. In contrast, St. Paul only collects recyclables; individual home owners and businesses are responsible for arranging with private haulers to collect and manage other waste. Dunn Aff. #2, ¶ 8, Appellees' App. 3. Significantly, the disposal of waste collected by private haulers in St. Paul remains unaffected by the law. In contrast, when a public entity like Minneapolis chooses to manage waste, the statute does apply and the public entity must either comply with its county plan or get the county's consent to manage the waste differently. Contrary to NSWMA's statement, public entities have, in fact, sought and received consent from counties to manage waste in a manner different from the county plan.[3]

Each of Minnesota's 87 counties has adopted a solid waste management plan as required by state law. *See* n.1 *supra*. The plan evaluates the waste management needs and problems in the county and identifies and evaluates various waste management alternatives. Dunn Aff., ¶ 13, Appellant's App. 00151. Each county is required to address in its plan how the county will meet the state's recycling goals and manage waste tires, household hazardous waste, and major

[3] For example, the City of East Grand Forks received the consent of Polk County to take a portion of its waste to a landfill in North Dakota, instead of to the incinerator listed in the county plan. *See* Dunn Aff. #2, ¶ 10, Appellees' App. 3-4.

appliances. Dunn Aff. #2, ¶ 4, Appellees' App. 2. Many counties have developed programs for yard and food waste composting, and for management of used oil, construction debris and lead acid and dry cell batteries. *Id.* For waste not managed by these methods, counties must evaluate and select either resource recovery or landfilling as their preferred method of waste management. *Id.*

Not surprisingly, counties have chosen different waste management methods, depending on the unique needs of the county. For example, 49 counties and one waste district have chosen resource recovery using incineration of waste with recovery of energy, or composting of mixed municipal solid waste, or a combination of these methods. *Id.* The remaining 38 counties have selected landfilling as their waste management method. *Id.* Contrary to NSWMA's suggestion, public entities that manage waste are required to comply with county plans not only in the 49 counties that have chosen resource recovery, but also in the 38 counties that have chosen landfilling as their preferred method of waste management.

County plans can identify a waste management method in a variety of ways. For example, some county plans may select landfilling, without specifying a particular facility. Appellant's App. 00011. Public entities that manage waste in that county can then take their waste to any landfill. *Id.* Other county plans may express a preference for a particular facility. *Id.* In that case, public entities that manage waste in the county must take their waste to the identified facility. *Id.* Some counties have selected out-of-state landfills and processing facilities in neighboring states of North Dakota, Iowa, and Wisconsin. *See, e.g.*, Appellant's App. 00049, 00054, 00058, and 00138. Some counties own and operate facilities; others do not.

To assist in the development and implementation of county-wide solid waste management programs, the state and its taxpayers provided nearly $140 million between 1989 and 1995 to counties and other local units of government. The state has provided this funding for the development of programs for management of household hazardous waste and problem materials, for implementation of recycling, and for the design and construction of solid waste management facilities for recycling, waste-to-energy production, composting, tire processing, household hazardous waste and problem material management, yard waste management, and transfer stations. *See* Third Affidavit of Arthur E. Dunn ("Dunn Aff. # 3"), ¶¶ 3-6, Appellees' App. 9-10. Counties have also spent significant amounts of money to prepare and implement county plans and construct and operate solid waste resource recovery facilities and landfills. Finally, public entities that manage solid waste spend public funds when they collect and manage waste or hire contractors to do so.

County plans embody state policy on a wide range of waste management matters, including the goals of reducing the amount and toxicity of waste, the recovery of energy from waste, the reduction in the dependence on land disposal, and the coordination of solid waste management among political subdivisions. *See* Minn. Stat. § 115A.02 (1996), Pet. App. A-30. County plans were prepared and adopted after significant public and private input. Dunn. Aff., ¶ 11, Appellant's App. 00150. All county plans are reviewed and approved by the Minnesota Office of Environmental Assistance and must be updated every five years. *Id.* County plans are comprehensive solid waste management planning documents designed to ensure adequate, environmentally protective solid waste management for the future to protect public health and welfare. *See* Minn. Stat. § 115A.46, subd. 1 (1996), Pet. App. A-31.

The public entities to which the statute applies (*see* n.1 *supra*) were created by the Minnesota Legislature, which, under the Minnesota Constitution, has broad control over such governmental entities. *See* Minn. Const., art. 12, § 3. The legislature's control over and involvement in the economic decisions of its political subdivisions is extensive and includes, for example, statutorily-mandated bidding requirements and purchasing preferences and extensive oversight of local government budgeting, accounting, and contracting procedures. *See infra* at 17-18.

NSWMA's lawsuit was filed in 1996 against the Director of the Office of Environmental Assistance and the Commissioner of the Minnesota Pollution Control Agency ("the State") challenging the constitutionality of Minn. Stat. § 115A.46, subd. 5 (1996), and a related statute under the Commerce Clause of the United States Constitution.[4] NSWMA alleged that the challenged statute violates the dormant Commerce Clause by barring or restricting interstate commerce in waste disposal services.

The district court granted summary judgment to the State holding that the state, acting through its political subdivisions, was a market participant and in that capacity was not subject to the limitations imposed by the Commerce Clause. *NSWMA v. Williams*, 966 F. Supp. 845 (D. Minn. 1997); Pet. App. at A-10. The court reasoned that since state agencies and

[4] The related statute, Minn. Stat. § 115A.471 (1996), requires public entities that want to undertake certain waste management practices to first evaluate and develop a plan for managing their own potential liability. The court of appeals affirmed the decision of the district court that NSWMA did not have standing to challenge the provisions of Minn. Stat. § 115A.471. NSWMA has not requested review of this aspect of the court of appeals' decision.

political subdivisions derive their authority from the state, the logical extension of that relationship includes the ability of the state to set parameters for its governmental units as market participants. *Id.* at 851; Pet. App. at A-21 and A-22. In reaching this conclusion, the court was guided by the analysis of the Third Circuit Court of Appeals in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), and the Ninth Circuit Court of Appeals in *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173 (9th Cir. 1992), which both upheld the constitutionality under the market participation exception of state statutes that placed conditions on the contracting authority of their governmental subdivisions. *NSWMA*, 966 F. Supp. at 850-51; Pet. App. at A-21 and A-22.

In upholding the constitutionality of the statute, the district court did not accept NSWMA's arguments that the statute was "flow control" of the type found to be unconstitutional by the Court in *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994). *NSWMA*, 966 F. Supp. at 847; Pet App. at A-13 and A-14. The district court recognized that the statute here does not regulate the private market for waste management and, therefore, does not implicate the Commerce Clause concerns that animated the *Carbone* decision. Instead, because the statute establishes conditions only for public entities, not private parties, that manage waste, the court found the market participation exception to the Commerce Clause applicable. *See id.* at 851-52; Pet. App. at A-22 through A-25.

The Eighth Circuit Court of Appeals affirmed the decision of the district court. *NSWMA v. Williams*, 146 F.3d 595 (8th Cir. 1998); Pet. App. A-1. It agreed with the reasoning of the Third Circuit Court of Appeals in *Trojan Technologies* and held that the state is a market participant

when it establishes conditions that its governmental subdivisions must follow when they contract for waste management services. The court acknowledged that under Minnesota law public entities are creations of the state, derive their power solely from the state, and are subject to the unlimited authority of the state. The court reasoned:

> We are hard pressed to fathom how an entity created by the state, controlled by the state, and subject to the absolute power of the state, should be considered an independent entity when it undertakes to buy waste services on the open market. Public entities should not be considered independent from the state when they contract for the removal of their waste.

146 F.3d at 599-600; Pet. App. at A-8.

The court of appeals concluded that the state's action was in the role of purchaser of waste disposal services, and that the statute "does not reach beyond those parties who, like the Association's [NSWMA's] members, 'are actually and freely dealing with the state in its business enterprise.' " 146 F.3d at 600; Pet. App. at A-8, quoting *Chance Management, Inc. v. South Dakota*, 97 F.3d 1107, 1112 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1083 (1997).

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review of this case. There is no conflict in the circuit courts that this Court needs to resolve because a consensus has now developed in the Third, Fourth, Ninth, and Eighth Circuits that the state is a market participant when it specifies conditions that its subordinate governmental subdivisions must follow in purchasing goods and services. This consensus is based on

the control, long recognized by this Court, that a state has over its governmental subdivisions. The only decision to the contrary is a 14-year-old decision from the Seventh Circuit, which has not been followed by other circuit courts, and which is not squarely in conflict with the more recent circuit court decisions because the Seventh Circuit decision was based, in part, on the "substantial autonomy" of local school boards in Illinois. The decision of the Eighth Circuit in this case is consistent with the decisions of this Court both on the control that a state has over its governmental subdivisions and on the market participation exception to the Commerce Clause.

A CONSENSUS HAS DEVELOPED IN THE CIRCUIT COURTS AND, THUS, THERE IS NO CONFLICT THAT DEMANDS THE ATTENTION OF THIS COURT.

There is no need for this Court to grant review in this case to resolve a conflict among the circuit courts. Although arguably a conflict may have existed in 1990 between the Third Circuit and the Seventh Circuit when this Court denied review of the Third Circuit Court's decision in *Trojan Technologies*, four circuit courts have now addressed and analyzed the issue and have reached a consensus on the matter, all rejecting the Seventh Circuit's approach. The Third Circuit (in 1990), the Ninth Circuit (in 1992), the Fourth Circuit (in 1994) and now the Eighth Circuit (in 1998) are in accord that a state is a market participant when it establishes conditions that its subordinate governmental units must follow when they contract for goods or services. All four circuit courts based their conclusions that the state was a market participant on the well-recognized control that the state has over its governmental units, as defined by state law, and on the fact that the statutes applied only to government

purchases, not purchases by private parties. Thus, rather than presenting a live conflict that requires resolution by this Court, the Seventh Circuit decision relied on by NSWMA offers only a faulty analysis that has been rejected by every circuit court that has subsequently addressed the issue.

The 1984 decision of the Seventh Circuit whose reasoning has been rejected by all four circuit courts is *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984). In that case the court declared unconstitutional under the Commerce Clause an Illinois law requiring contractors on local government public works projects to employ Illinois labor if available and capable of performing the work. The court held that in order for a state to qualify as a market participant in placing restrictions on a local government's contracting authority, the state must provide either funding for or administrative oversight of the local government activity. *See id.* at 495. The court concluded that Illinois was not a market participant, basing its decision in part on the "substantial autonomy" that local school boards had in Illinois and in part on the court's view that state funding or involvement in the project was a necessary component for the state to be a market participant. *See id.*

The first court to reject the Seventh Circuit's reasoning was the Third Circuit in 1990 in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990). In that case, the Third Circuit upheld the constitutionality of a Pennsylvania statute under the market participation exception to the Commerce Clause which required suppliers contracting with state agencies *and* local governmental entities to provide products made of American-made steel. The court concluded that Pennsylvania was a market participant, not a market regulator, because under Pennsylvania law local governmental units exist only by "grace of state authority" with such powers

as the state provides. *See id.* at 911. Consequently, the state could restrict the contracting authority of political subdivisions, such as cities and towns, in the same manner that it restricts the contracting authority of state agencies, since under Pennsylvania law both derive their authority solely from the state. *See id.* Because the statutory requirement applied only to the state and its subordinate governmental units, not private parties, the statute was consistent with the purposes underlying the Commerce Clause. *See id.* at 912. This Court denied review of the decision. *See Trojan Technologies, Inc. v. Pennsylvania*, 501 U.S. 1212 (1991).

The Third Circuit specifically rejected the reasoning of the Seventh Circuit that political subdivisions, such as cities and towns, should be treated differently from state agencies for market participation purposes:

> We find no compelling analytical difference between a local government unit and central state agencies. Both exist only through affirmative acts of the state. A municipality derives its authority from the state. Under Pennsylvania law it is clear that the local bodies covered by the statute exist only by grace of state authority and with such powers as the state affirmatively provides. We see no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies. Imposing such restrictions on central state agencies certainly would be permitted and we do not believe restrictions on local bodies stand in any different light.

916 F.2d at 911 (citations and footnote omitted).[5] Finding that the statute fit within the market participant exception to the Commerce Clause, the court concluded:

> As the ultimately controlling public purchaser, the Commonwealth enjoys the same right to specify to its suppliers the source of steel to be used in any supplies provided as is enjoyed by similarly situated private purchasers.

Id. at 911.

The Third Circuit also rejected the Seventh Circuit conclusion that the Commerce Clause prevents state "regulation" of the purchases of governmental subdivisions, stating:

> Nor do we find that the commerce clause's underlying purposes require a broad prohibition against state regulation of local municipal purchases. As noted in *Reeves*, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free *private* trade in the national marketplace ... [t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." 447 U.S. at 436-37, 100 S. Ct. at 2277 (emphasis added). Nor, we take it, is there any indication of an intent to limit the market operations of local public entities. Given that local entities can presumably decide for

[5] This Court has noted that when a state requires state agencies to purchase certain in-state products, the state is a market participant. *See Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992).

> themselves to contract only for American steel, cf. *White*, 460 U.S. at 215, 103 S. Ct. at 1048, we think it clear that the Commonwealth, from which local municipalities derive their power, can impose similar limits.

Id. at 912. *See also* Barton B. Clark, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615 (1993) (concurring with the reasoning of the Third and the Ninth Circuits that their market participation analysis gives proper consideration to the inherent variations in state law concerning the authority of the state over its political subdivisions).

Two years later, the Ninth Circuit concurred with the reasoning of the Third Circuit. In *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173 (9th Cir. 1992), the Ninth Circuit upheld, against a Commerce Clause challenge, an Alaska statute giving a seven percent bidding preference to Alaska milk harvesters in contracts to supply milk to school districts in Alaska. The court concluded that Alaska was a market participant when it used its school districts to implement a milk purchase program and reasoned, like the Third Circuit, that the state was a market participant because political subdivisions exist at the will of the state. *See id.* at 1179.

Then, in 1994 the Fourth Circuit agreed with the reasoning of the Third and Ninth Circuits when it upheld under the market participation doctrine a state statute and regulation that gave a preference to local products and local vendors when the state and its educational bodies contracted for such purchases. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1319-20

(4th Cir. 1994). Although the statute did not require compliance by local governments, it allowed local governments to use state contracts, which contained this preference, to purchase goods. The statute was challenged because of the claimed "regulatory effect" on local governments that resulted from the ability of local governments to purchase goods using state contracts. *See id.* at 1318. In rejecting the argument that the statute was regulatory, and thus subject to the Commerce Clause restrictions, the court agreed with the Third and Ninth Circuits. The court explained:

> [T]he distinction [*W.C.M. Window*] draws between state and local governments simply does not make sense in this constitutional matter. [Citations to *Trojan Technologies* and *Big Country* omitted.] There is little analytic reason to treat the two separately for Commerce Clause purposes; market participation by *either* is immunized from negative Commerce Clause attack. *White*, 460 U.S. at 208, 103 S. Ct. at 1044. State rules that "regulate" the market actions of a state's constituent agencies, departments and other state-level organizational manifestations are conceded not to be considered "market regulating" for negative Commerce Clause purposes. To posit then that the state is "regulating" the market in requiring local governments to abide its rules thus only sidesteps the actual inquiry here, which is to determine at what point the state stops regulating itself and its action in the market *qua* market participant (a type of action immune from attack) and begins regulating non-state actors (a type of action subject to attack).

Smith Setzer, 20 F.3d at 1319-20 (emphasis in original). The court answered this question by focusing on the party that is being "regulated" -- the public entity:

> This having been stated, we cannot discern a valid distinction to explain why state regulations that bind local governmental units should not be considered equally as innocuous, constitutionally speaking, as state regulations that bind state-wide governmental units. Rather than focus on the state's action to see whether it is "regulatory," or on the quantitative impact of the regulation involved, the proper inquiry is into *whom* the state regulates: so long as the regulated party is a public entity, we do not believe the market participant doctrine's bounds are exceeded.

Id. at 1320 (emphasis in original).

Finally, the Eighth Circuit in this case also concurred with the reasoning of the Third Circuit and upheld the constitutionality of Minn. Stat. § 115A.46, subd. 5, concluding that the state is a market participant when it requires public entities that choose to manage waste to do so consistent with their county's solid waste management plan. Like the Third Circuit and the Ninth Circuit, the Eighth Circuit also based its decision on the control, under state law, that the state has over its governmental subdivisions. *See NSWMA v. Williams*, 146 F.3d 595, 599-600 (8th Cir. 1998); Pet. App. at A-8. Because under Minnesota law the state has complete authority over its subordinate governmental units, the court of appeals held that the state is a market participant when it establishes conditions that its public entities must follow in contracting for waste management services. *See id.* The court of appeals concluded that the state's action was in

the role of purchaser of waste disposal services and that the statute did not reach beyond those parties who were freely dealing with the state in its business capacity. *See id.*

Thus, because a consensus has now developed in the circuit courts, there is no reason for the Court to grant review in this case. As described in Parts A and B below, this prevailing view in the circuit courts is consistent with this Court's decisions on the relationship between a state and its governmental subdivisions and on the market participation exception to the Commerce Clause.

A. The Decision Below Is Consistent With Previous Decisions Of This Court On The Relationship Between A State And Its Governmental Subdivisions.

This Court has long recognized that the status of political subdivisions is a matter of state, not federal, law. *See Avery v. Midland County, Texas*, 390 U.S. 474, 480 (1968). In reviewing decisions involving political subdivisions, this Court has acknowledged the near complete authority that a state has over its governmental units. Thus, in *Reynolds v. Sims* this Court described political subdivisions as existing to assist the state in carrying out state functions with the power they exercise "in the absolute discretion of the state." 377 U.S. 533, 575 (1964). In *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), this Court described the relationship between the state and its political subdivisions as follows:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may

> withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.

Id. at 187 (footnote and citation omitted).

This view of political subdivisions is consistent with their status under Minnesota law. In Minnesota, the Legislature has broad authority to create local governmental units and define their authority. *See* Minn. Const., art. 12, § 3 (legislature may provide for creation, organization, administration, consolidation, division, and dissolution of local units of government and their functions). Because governmental subdivisions are subject to the broad control and direction of the legislature, the legislature can require governmental subdivisions to perform duties of state concern. *See Associated Schools of Independent Dist. No. 63 v. School Dist. No. 83*, 142 N.W. 325, 326 (Minn. 1913). This legislative authority has been described by Minnesota courts as unlimited. *See State ex rel. Erickson v. Gram*, 210 N.W. 616 (Minn. 1926). Even home rule cities, which in some states may have a separate status independent of legislative control, are, in Minnesota, subject to the legislature's right to enact general laws that are paramount to home rule charters. *See id.* In fact, the definition of "public entity" to which the challenged statute applies includes home rule charter cities. *See* n.1 *supra.*

The authority Minnesota has over its governmental subdivisions is reflected in the extensive involvement that the state has in the economic decisions and life of its political subdivisions. For example, the state requires counties, cities, towns and school districts to use a competitive bidding

process when procuring equipment and supplies, making improvements, and contracting for work and labor. *See, e.g.*, Minn. Stat. §§ 471.345, 375.21, 429.041, and 412.311 (1996). The Legislature also requires public entities to give a preference when contracting for certain types of goods and services, such as recycled content paper, soy-based inks, packing peanuts made from vegetable starches, and goods and services that reduce the quantity and toxicity of waste. *See* Minn. Stat. §§ 16B.122 and 16B.123 (1996). Moreover, the State Auditor, whose office is established by the Minnesota Constitution with its duties defined by the Legislature, is charged with overseeing the management of the fiscal matters of local governments. *See* Minn. Const. art. 5, § 4 and Minn. Stat. § 6.01 (1996). The State Auditor is required to audit and inspect the accounting and budgeting systems of cities, towns, counties, school districts and other governmental subdivisions, and may prescribe uniform systems of accounting. *See* Minn. Stat. §§ 6.46-6.51 (1996). The State Auditor may also examine the accounting procedures and practices of contractors of local governments relevant to the contractors' work for local governments. *See* Minn. Stat. § 6.551 (1996). Thus, the state's direction to public entities regarding management of solid waste is but one of many ways in which the state determines how those subordinate entities carry out market activities.

The court of appeals acknowledged this broad control that Minnesota has over its governmental subdivisions and based its decision that the state is a market participant partly on that conclusion. *NSWMA v. Williams*, 146 F.3d at 599-600; Pet. App. at A-8. Likewise, the Third Circuit in *Trojan Technologies* also based its decision that Pennsylvania was a market participant in part on local governments in Pennsylvania existing only by "grace of state authority." *Trojan Technologies*, 916 F.2d at 911. The Ninth Circuit also

based its decision on the fact that political subdivisions "exist at the will of the state." *Big Country Foods*, 952 F.2d at 1179. In contrast, the Seventh Circuit in *W.C.M. Window* based its decision that the state was not a market participant partly on the "substantial autonomy" that school districts have in Illinois. *W.C.M. Window*, 730 F.2d at 495. This difference in underlying state law is sufficient to distinguish the holding of the Seventh Circuit from the holdings of the Third, the Ninth and the Eighth Circuits. Thus, this Court need not review the court of appeals' decision.

Despite this well-recognized relationship between a state and its governmental subdivisions, NSWMA argues that the reasoning of the court of appeals is "too simplistic," citing this Court's decisions interpreting the Eleventh Amendment to the United States Constitution and antitrust laws. Petition at 20. First, NSWMA notes that although the Eleventh Amendment protects states from being sued in federal court for money damages, it does not provide such immunity to local governments. *Id.* This argument overlooks the unique function of the Eleventh Amendment in our federalist system, which is to maintain the constitutionally-protected balance of power between states and the federal government. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). That the state and its political subdivisions do not share the attributes of sovereignty in the Eleventh Amendment context says nothing about their relationship in the proprietary context of market participation.

NSWMA also argues that this Court should review the court of appeals' decision because its reasoning is inconsistent with antitrust law, which does not treat political subdivisions as "equivalent" to the State for purposes of immunity from antitrust liability. Petition at 20. However, the Eighth Circuit did not hold that the state and its political subdivisions are

"equivalent," since political subdivisions are not by their nature sovereign entities. Rather, the court of appeals concluded that the state, acting through its public entities over which it has absolute authority, was a market participant. 146 F.3d at 599-600; Pet. App. at A-8. This view of the relationship between the state and its political subdivisions is fully consistent with antitrust law since municipalities are shielded from antitrust liability when they act pursuant to a clearly articulated state policy that authorizes the challenged anticompetitive conduct. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). As this Court has explained, the *Parker* doctrine, which established state action immunity, "preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415-16 (1978).

Rather than being inconsistent with antitrust laws, the reasoning of the Eighth Circuit is fully consistent with this Court's interpretation of such laws. Through the operation of the state action immunity doctrine, federal antitrust laws recognize the authority of the state to define how it will administer state-determined policies through its governmental subdivisions. This approach is consistent with the application of the market participation exception in this case.

B. The Consensus That Has Developed In The Circuit Courts Is Consistent With This Court's Decisions On The Market Participation Exception To The Commerce Clause.

NSWMA argues that the challenged statute is really just regulatory "flow control" enacted to circumvent this Court's decision in *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994), by "regulating" public entities, and that this Court should accept review to prevent this result.[6] Petition at 14. This argument ignores the important distinction between market participation and market regulation. A state's self-imposed limitations on how government --whether state or local -- will manage waste, rather than how private parties must manage waste, is not a regulation within the meaning of the Commerce Clause. This Court's decisions support this distinction.

The focus of the Commerce Clause is on "state taxes and regulatory measures impeding free *private* trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) (emphasis added). Thus, this Court in *C & A Carbone* struck down a flow control ordinance that required all solid waste to be processed at a designated transfer station before leaving the municipality. As a regulation of private traders in the solid waste market, the flow control ordinance was evaluated under the Commerce Clause analysis.

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[6] As noted in the Statement of the Case, Minnesota did not enact this statute, as NSWMA implies, in 1995 after the *Carbone* decision when "faced with growing pressure to prop up governmentally financed waste disposal facilities." Petition at 7. Rather, this statute was first enacted in 1991, long before the 1994 decision of this Court in *Carbone*, or any other court struck down certain Minnesota flow control ordinances as violating the Commerce Clause.

Although the Commerce Clause imposes limits on the power of states to regulate private trade in interstate commerce, it does not prevent a state from participating in the market and exercising its right to favor its own citizens or products over others. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Consequently, when a governmental entity enters the market as a participant, it is not subject to the inherent restrictions of the Commerce Clause and it enjoys unrestricted power, like a private business, to determine with whom it will deal and to set the terms and conditions on which it will make purchases of goods and services. *See Reeves*, 447 U.S. at 439 nn.10 and 12. *See also White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 211 (1983) (holding that the city of Boston was a market participant when it required its contractors to hire city residents, even when that requirement was applied to the subcontractors of the city's contractor with which the city did not have formal privity of contract). As a result, the interstate economic impact of a state's conduct is not significant for Commerce Clause purposes when the government is participating in, rather than regulating, the market. *See id.* at 210. This distinction between the state acting as a market regulator and the state acting as a market participant "makes good sense and sound law." *Reeves*, 447 U.S. at 436.

A type of activity protected by the market participation exception is public contracting for goods and services, which is a proprietary function, not an exercise of a government's regulatory power. *See American Yearbook Co. v. Askew*, 339 F. Supp. 719, 721-22 (M.D. Fla.) (three-judge court), *aff'd*, 409 U.S. 904 (1972), *cited with approval in Reeves*, 447 U.S. at 437 n.9. One of the ways that government defines how it will purchase goods and services is through statutes that prescribe the terms and conditions of public purchases.

Numerous lower courts, in addition to the Third, Fourth, Ninth, and Eighth Circuit Courts, have upheld against Commerce Clause challenges the constitutionality of state-mandated purchasing requirements on public bodies. For example, in *American Yearbook*, the court rejected the argument that a Florida statute that required that all public printing be done in Florida violated the Commerce Clause. The court held instead that the printing requirement was merely a state purchasing requirement. The court explained:

> What plaintiff fails to recognize is that those statutes [cited by the plaintiff] regulated private industry. Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not.

339 F. Supp. at 725.

Although the *American Yearbook* decision was reached four years before this Court used the phrase "market participation" to describe such activities, the decision in *American Yearbook* was cited with approval in *Reeves* in its discussion of market participation principles. This Court noted that many state courts have upheld against a Commerce Clause challenge preference statutes like those in *American Yearbook* that specify the conditions of government purchases:

> *Alexandria Scrap* does not stand alone. In *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla. 1972), a three-judge District Court upheld a Florida statute requiring the State to obtain needed printing services from in-state shops. It reasoned that "state proprietary functions" are exempt from Commerce Clause scrutiny. *Id.*, at 725. This Court affirmed

> summarily. Numerous courts have rebuffed Commerce Clause challenges directed at similar preferences that exist in "a substantial majority of the states." The only clear departure from this pattern, drew a strong dissent and has been uniformly criticized in later decisions.

Reeves, 447 U.S. at 437 n.9 (citations omitted).[7]

Despite the fact that this Court has recognized that such preference statutes exist in a "substantial majority of the states," NSWMA raises the specter that if the Court does not review this decision, every state will use its purchasing power to achieve its own "parochial interests." Petition at 22. But it is those very state interests that the Court has recognized are an important consideration of state sovereignty that the market participation exception was intended to protect. This Court has cautioned that because of considerations of state sovereignty, courts should exercise restraint in reviewing such proprietary activities, especially those that involve traditional governmental functions. *See Reeves*, 447 U.S. at 438 and n.10. Because each state is a guardian and trustee for its people, the state may "fairly claim a measure of sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal." *Id.* Moreover, when a government

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[7] Among the cases cited by the Court in *Reeves* were ones in which the challenged statute applied to purchases both by state agencies and local units of government. *See City of Phoenix v. Superior Court*, 514 P.2d 454 (Ariz. 1973) (upholding against a Commerce Clause challenge an Arizona statute that gave a bidding preference to qualified resident contractors on contracts for work to be paid from public funds) and *Denver v. Bossie*, 266 P. 214 (Colo. 1928) (upholding against a Commerce Clause challenge a Colorado statute requiring public works projects to give a preference for Colorado products).

acts in its proprietary capacity, its decisions often involve considerations that may be "subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, [the decision in] *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court." *Id.* at 439.

Solid waste management in Minnesota did not happen by itself. It was the result of at least 16 years of federal, state and local planning and implementation efforts and approximately $140 million in taxpayer money to develop and implement county-wide solid waste management programs. Dunn Aff., ¶ 22, Appellant's App. 00153; Dunn Aff. # 3, ¶¶ 3-6, Appellees' App. 9-10. The challenged statute is a part of the state's policy efforts to see that solid waste managed by governmental entities is managed consistent with the state's environmental goals. The statute at issue insures that public entities, which the state created to carry out state-defined functions, undertake solid waste management activities in a manner that is consistent with the state's planning efforts. The market participation exception is designed to allow the state to make and implement such policy choices through market place decisions. Unlike the invalid flow control ordinances to which NSWMA so frequently refers, the statute at issue here does not regulate disposal of waste by private parties. The court of appeals correctly upheld the constitutionality of the challenged statute under the market participation exception to the Commerce Clause, and there is no need for this Court to review its decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted

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